

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

September 30, 2004 Session

ROBERT FOSTER v. MORROW TRUCKING, INC., et al.

Appeal as of Right from the Circuit Court for Hardin County

No. 3252 C. Creed McGinley, Judge

No. W2003-03098-WC-R3-CV - Mailed December 6, 2004; Filed January 25, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. This case was previously before the Panel in Foster v. Morrow Trucking, et al., No. W2002-0041-WC-R3-CV (Foster I). In that appeal, the Panel remanded the case to the trial court for specific findings of fact regarding the percentage of disability that would have resulted from employee's November, 1999 injury without consideration of his pre-existing diabetic neuropathy. Upon remand the trial court fixed the permanent partial disability resulting from the November, 1999 work related injury at 50% to the body as a whole without any consideration of his pre-existing disease. As discussed below, the Panel concludes that the evidence does not preponderate against that finding and, accordingly, affirms the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Trial Court Affirmed

John A. Turnbull, Sp. J., delivered the opinion of the court, in which Janice M. Holder, J., and Joe C. Loser, Jr., Sp. J., joined.

Ricky L. Boren, Jackson, Tennessee, for the plaintiff/appellee, Robert Foster.

Dale A. Tipps and Sara O. Thomas, Nashville, Tennessee for the defendanst/appellants, Morrow Trucking, Inc. and Logistics Personnel Corporation.

Paul G. Summers, Attorney General and Reporter; Richard M. Murrell, Assistant Attorney General, for defendant-appellee, Second Injury Fund, State of Tennessee.

MEMORANDUM OPINION

Procedural History

The employee, Mr. Foster, filed this civil action to recover workers' compensation benefits for a work-related injury alleged to have occurred on November 4, 1999, while working for Morrow Trucking Company, Inc., the employer. The Second Injury Fund was added by amendment alleging that the November injury was, in fact, a second injury because, at the time he was hired

by Morrow, he suffered from diabetes which he revealed to Morrow at the time of his hiring. Mr. Foster claimed that the combination of his on-the-job injury (aggravation of a pre-existing spondylolisthesis) and his uncontrolled diabetic neuropathy rendered him totally and permanently disabled. The trial court made the following findings of fact which were affirmed by the Panel and are therefore the law of this case, see State v. Jefferson, 31 S.W.3d 558 (Tenn. 2000):

1. Mr. Foster suffered a compensable injury in November, 1999.
2. That injury was a back sprain which aggravated an underlying spondylolisthesis which was previously unknown to Mr. Foster or his employer.
3. Mr. Foster, at the time of his hiring by Morrow, suffered from pre-existing diabetic peripheral neuropathy.
4. Foster gave Morrow sufficient notice of his pre-existing disease.
5. The combination of the compensable injury of November, 1999 and the pre-existing disease rendered Foster totally and permanently disabled.

The trial judge divided the liability equally between the employer and the Second Injury Fund, but did not comment as to what disability would have resulted from the compensable injury of November, 1999, without consideration of the pre-existing disease. Because Tennessee Code Annotated section 50-6-201(a)(1) "explicitly requires that the trial court find what disability would have resulted if a person with no pre-existing disability, in the same position as the plaintiff, had suffered only the second injury," the Panel remanded the case to the trial court. The Panel directed, "[o]n remand, the trial court should make a specific finding of fact regarding the percentage of disability that would have resulted from the plaintiff's November, 1999, injury if he had not had a pre-existing disability." Therefore, on remand the trial court was required to make a specific finding of the percentage of disability attributable solely to the back sprain that aggravated the underlying spondylolisthesis.

On remand, the trial court held:

This court specifically finds, as a result of plaintiff's November 4, 1999, work related injury (pre-existing spondylolisthesis, aggravated and made symptomatic by fall) he sustained a fifty percent permanent partial disability to the body as a whole. It is this court's intent to reflect that this fifty percent permanent partial disability rating is made without any consideration whatsoever of the plaintiff's disability for diabetic peripheral neuropathy. This fifty percent permanent partial disability which is assessed against the employer, Morrow Trucking, Inc., takes into account all of the factors under the Workers' Compensation statute which were earlier set forth in the court's ruling, including the plaintiff's lack of education, limited job skills, age restrictions etc.

The trial court's oral ruling at trial included the following:

But if you read those medical reports as a whole and you also listen to the testimony of Mr. Foster and you also take into consideration that this is a person of very limited education; he finished the ninth grade, dropped out in the tenth

grade, and had absolutely no skilled .. no skills that are transferable to anything he is capable of doing. His only vocational history is that of either labor, some type of generalized labor, or truck driving for which he received vocational training[.] .

The trial judge also considered the permanent impairment ratings and medical testimony, commenting that Dr. Boals' 20% permanent impairment rating attributed solely to the aggravation of the spondylolisthesis was "probably higher than it should have been rated if you look at all the factors in the case." As to Dr. Glover's testimony regarding the effect of the injury, the trial judge stated: "Dr. Glover rated 0 at one time. Then he came back and said 7. And then when he got to figuring in the diabetic neuropathy, the peripheral neuropathy, he equivocates between 3 and 4 percent."

With regard to the lay evidence in the case the trial court found that "[t]he lay evidence supports in this case the fact that the injury to the back lent itself to the disability in this case."

Analysis

Mr. Foster was forty-nine years of age at the time of trial. He had completed nine years of school and does not have a GED. His work history includes farming, attending to a gas station, cooking, working in a saw mill, and loading and unloading trucks. Mr. Foster received training as a truck driver and followed that occupation for a number of years.

Prior to his injury of November, 1999, Mr. Foster had a history of medical treatment for back pain which had not been disabling and from which he had recovered without losing work. He had never been diagnosed as having spondylolisthesis. He had not complained of back pain to his regular physician, Dr. Y.N. Pakkala, during his eleven visits to the doctor between August of 1995 and his injury in November, 1999.

Mr. Foster's treatment by Dr. Pakkala focused on his diabetes, which the doctor treated with oral medication. Mr. Foster rejected his doctor's suggestion that he take injectable insulin to treat his diabetes because he would then be disqualified from driving a truck, a job he needed to earn a living. Dr. Pakkala diagnosed diabetic peripheral neuropathy in June, 1999, but never required Mr. Foster to begin taking insulin. Instead, he attempted to control the diabetes with oral medication.

After his back injury in November, 1999, Mr. Foster was initially treated by Dr. Pakkala for back and left leg pain. Dr. Pakkala believed Mr. Foster had pulled a muscle in his back and kept him off work for a week. Mr. Foster returned to work for ten days, but his back and leg pain increased. On December 6, 1999, Dr. Pakkala referred Mr. Foster to Dr. Michael Glover, an orthopedic surgeon, who first saw Mr. Foster on December 17, 1999. Dr. Glover ordered x-rays and an MRI which demonstrated spondylolisthesis, a slippage between vertebrae in the back. In Mr. Foster's case, this caused a severe bilateral stenosis at L5-S1, a narrowing of the small openings in the spine through which the spinal nerves pass. Dr. Glover attributed Mr. Foster's back and left leg pain to the aggravation of the spondylolisthesis. When the left leg pain diminished, and Mr. Foster began to complain of right leg pain in early January, 2000, Dr. Glover began looking for another cause. An EMG (nerve conduction test) confirmed severe bilateral diabetic peripheral neuropathy. Dr. Glover attributed the right leg pain and "giving out" symptoms to that disease, rather than to the November, 1999 injury.

Dr. Glover's testimony regarding the degree of permanent impairment resulting from the November, 1999 injury was equivocal. First, on April 10, 2000, Dr. Glover sent a report stating that Mr. Foster's back sprain had resolved and assigned no permanent impairment. Second, after reports by Mr. Foster of continued back pain on April 18, 2000, Dr. Glover re-assessed his opinion and assigned a permanent impairment rating of 7% to the body as a whole as a result of the November, 1999 injury. Finally, during his deposition, Dr. Glover opined that the impairment rating should be 3 ½% if one considered that Mr. Foster's complaints of back pain had been more frequent since the accident.

It is unclear from Dr. Glover's deposition testimony what, if any, physical restrictions are caused by the November, 1999, injury.

Dr. Joseph Boals, also an orthopedic surgeon, saw Mr. Foster on September 28, 2000, and expressed a far different opinion as to the cause of Mr. Foster's continuing leg and back symptoms. Dr. Boals attributed all the symptoms to the November 9, 1999 back sprain which aggravated his pre-existing spondylolisthesis. Dr. Boals confirmed that the slippage of the vertebrae was a grade one spondylolisthesis with a fifteen millimeter forward translation of L5 vertebral body onto the S1 vertebral body. Since the slippage exceeded the five millimeter slippage required to find a grade one spondylolisthesis by three times, Dr. Boals fixed a permanent partial impairment under the 5th Edition of the AMA Guides at 20% to the body as a whole. Dr. Boals imposed significant restrictions, including ten pounds or less lifting and avoiding prolonged standing, walking, climbing, stooping, squatting, twisting, and bending of the torso. With regard to Dr. Boal's ratings, the trial judge found, "[i]t is probably higher than what it should have been if you look at all the factors in the case."

The extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999). We review factual questions anew, but with a presumption that the trial court's factual findings are correct, unless the evidence preponderates against those findings. See Tenn. Code Ann. § 50-6-225 (e)(2) (Supp. 2002). Where the trial court has seen and heard the witnesses, the trial court's determination of issues of credibility and the weight to be given to oral testimony must be accorded considerable deference on review, McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995), because the trial court had the opportunity to observe the demeanor of the witness, Long v. Tri-Con Ind., LTD, 996 S.W.2d 173, 178 (Tenn. 1999). The trial court's findings with respect to credibility may generally be inferred from the manner the court resolves conflicts in the testimony and decides the case. Richards v. Liberty Mutual Ins. Co., 70 S.W.3d 729 (Tenn. 2002); Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). Where, as here, the medical testimony is presented by deposition or other written evidence, the reviewing court may make an independent assessment of that written evidence to determine where the preponderance of that evidence lies. See Cooper v. INA, 884 S.W.2d 446, 451 (Tenn. 1994).

The evidence in this case presented significant factual dispute, especially as to the cause of Mr. Foster's disabling symptoms and restrictions. One thing is clear from a review of the medical evidence: the symptoms caused by the November, 1999 injury and the symptoms caused by the peripheral neuropathy overlap are not easily distinguished as to cause. The trial judge implicitly rejected the extremes of opinion expressed by the doctors, and found the evidence persuasive that the truth lay somewhere between those opinions.

The trial judge was required by the panel's previous decision in Foster I and by Tennessee law to isolate the November, 1999 injury and consider that injury as though the diabetic neuropathy did not exist. See Allen v. City of Gatlinburg, 36 S.W.3d 73 (Tenn. 2001). We concede that it was not an easy task to determine the disability resulting solely from the back sprain that aggravated Foster's spondylolisthesis.

As previously noted, the extent of an injured worker's disability is an issue of fact. Story, 3 S.W.3d at 456. In assessing the extent of an employee's disability, the trial court may consider the employee's age, job skills and training, education, local job opportunities, anatomical impairment rating, restrictions, and ability to work at the kinds of employment available to him in his disabled condition. In addition, the injured employee's own assessment of his physical condition and resulting disabilities is relevant. See Walker v. Saturn Corp., 986 S.W.2d 204, 207-08 (Tenn. 1998).

One of the significant problems that Mr. Foster encountered when he returned to work was his inability to safely drive because he could not smoothly engage the clutch of his truck with his left foot. The medical evidence preponderates in favor of the conclusion that his left leg symptoms were caused by the aggravation of his spondylolisthesis. Likewise, the medical evidence preponderates in favor of the conclusion that Mr. Foster's back pain resulted solely from the November, 1999 injury. We do not find unsupported the trial judge's conclusion that Dr. Boals' impairment rating of 20% permanent partial disability to the whole person "is probably higher than it should have been if you look at all the factors in the case." We also give deference to the trial judge's conclusion that "the lay evidence supports in this case the fact that the injury to the back lent itself to the disability in this case." Where the trial judge has made a determination based upon the testimony of witnesses whom the trial judge has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. See Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

The evidence does not preponderate against the conclusion that, absent the diabetic peripheral neuropathy, the November, 1999 injury would have partially, but not totally, disabled Mr. Foster. His back pain, though aggravating, would not disable him from all available jobs. His left leg symptoms would have disabled him from driving a straight shift truck, but not one with an automatic transmission. Although the percentage of permanent medical impairment is not decisive in this case, a reasoned conclusion from the evidence would result in a permanent medical impairment of 12% to 15% to the body as a whole resulting solely from the back sprain which aggravated the underlying spondylolisthesis. That impairment and the symptoms resulting from that injury prevented Mr. Foster from returning to his job as a long distance tractor-trailer driver, but not from driving other vehicles with automatic transmission. Considering these factors, as well as Mr. Foster's age, education, his past employment and training, and the job opportunities available to him, we cannot conclude that the evidence preponderates against the trial judge's conclusion that, solely as a result of the November, 1999 injury Mr. Foster suffered, a 50% permanent partial disability to the body as a whole. Accordingly, we affirm the judgment of the trial court.

Costs of this appeal are assessed against the appellant, Morrow Trucking, Inc., and Logistics Personnel Corporation and their respective sureties for which execution may issue if necessary.

JOHN A. TURNBULL, SPECIAL JUSTICE

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JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellants, Morrow Trucking, Inc., and Logistics Personnel Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM